In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-964

SENECA-CAYUGA TRIBE OF OKLAHOMA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

NO. 75-965

SENECA-CAYUGA TRIBE OF OKLAHOMA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner[1] contends that the Indian Claims Commission and the Court of Claims erred in denying its claims for compensation based upon recognized title to land allegedly acquired by treaty with the United States and upon its non-exclusive possession of commonly used and occupied land.

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[1]Petitioners are the Seneca-Cayuga Tribe of Oklahoma and Peter Buck, *et al.*, suing in a representative capacity on behalf of members of the tribe. For convenience, all petitioners in these cases will hereafter be referred to simply as petitioner.

The Seneca-Cayuga Tribe of Oklahoma is the petitioner in each case. The two petitions for a writ of certiorari were filed simultaneously to seek review of orders of the Court of Claims denying, on similar grounds, petitioner's claims for compensation arising under two separate treaties (Pet. No. 75-964, p. 1; Pet. No. 75-965, p. 1). Each of those treaties concerned the cession to the United States of certain lands previously relinquished to the Indian tribe parties in the Treaty of Greeneville of August 3, 1795, 7 Stat. 49. A description of the relevant provisions of that treaty is contained in our Memorandum in Opposition to the petition for a writ of certiorari in *James Strong, et al.* v. *United States*, certiorari denied, No. 75-389, December 8, 1975.[2]

1. Petitioner in No. 75-964 is one of eleven Indian tribes whose overlapping claims to the lands ceded to the United States in the Treaty of Fort Industry of 1805, 7 Stat. 87, were consolidated for trial before the Indian Claims Commission. The Commission concluded that none of the claimants, including petitioner, had established aboriginal title to any portion of the ceded lands, over which no tribe maintained actual, exclusive and continuous use or occupancy "for a long time" prior to 1805 (Pet. No. 75-964 App. B, pp. 34a-35a). It further held that under the Treaty of Greeneville, various signatory tribes had recognized title to Royce Areas 53 and 54 (Pet. No. 75-964 App. B, pp. 14a-16a, 32a-36a), and awarded undivided one-fifth interests in those lands to the Delaware, Pottawatomie, Wyandot, Ottawa and Chippewa Tribes (Pet. No. 75-964 App. B, pp. 20a, 35a-36a). It also found that petitioner did not have recognized title to these lands because its predecessors in interest were not signatories of the Treaty of Greeneville and therefore acquired no rights in the lands therein relinquished by the

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[2]We are serving a copy of our memorandum in that case on petitioner's counsel.

United States (Pet. No. 75-964 App. B, pp. 10a, 12a, 15a-16a). Since only signatory tribes to the Treaty of Greeneville were accorded rights thereunder, *Sac and Fox Tribe* v. *United States*, 315 F.2d 896 (Ct. Cl.), certiorari denied, 375 U.S. 921, the Commission held that petitioner was not entitled to compensation for lands relinquished to the Indians in that Treaty but ceded back to the United States in 1805. It therefore dismissed petitioner's claim (Pet. No. 75-964 App. B, p. 35a), and denied its petition for rehearing (Pet. No. 75-964 App. C, pp. 40a-52a). On interlocutory appeal, the Court of Claims affirmed, one judge dissenting (Pet. No. 75-964 App. A, pp. 1a-3a).

Petitioner contends (Pet. No. 75-964, pp. 9-11) that its predecessors in interest were signatories of the Treaty of Greeneville, thereby entitling it to share in the compensation to be awarded for the later cession of those lands by the Indian tribes. Petitioner argues that one Reyntueco signed that treaty in a representative capacity on behalf of its ancestors, among other tribes, and that it therefore was a party to that Treaty, although its ancestors were not described as parties thereto in the preamble of the treaty (Pet. No. 75-964 App. C, p. 50a). But the Commission duly considered the capacity in which Reyntueco had signed the treaty and concluded that he did not represent petitioner's predecessors (Pet. No. 75-964 App. B, pp. 25a-26a, App. C, pp. 46a-51a). The Court of Claims implicitly affirmed this finding on appeal. In the absence of an exceptional showing of error, this Court should not consider petitioner's challenge to the sufficiency of the evidence on this factual issue. *E.g.*, *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275; *Radio Corp.* v. *United States*, 341 U.S. 412, 415.

Petitioner also contends (Pet. No. 75-964, pp. 3-4) that the Indian Claims Commission erred in holding that petitioner did not have aboriginal title to Royce Areas 53 and 54. Petitioner concedes (Pet. No. 75-964, p. 5) that its

ancestors did not enjoy exclusive use and occupancy of these lands,[3] but argues that the joint and amicable use of these lands by various Indians tribes constitutes a compensable interest under the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. 70, *et seq.*[4]

As we discussed in our Memorandum in Opposition in No. 75-389, the test of aboriginal title based on exclusive possession that was employed in this litigation has been repeatedly approved, both before and after enactment of the Act.[5] The Court of Claims properly refused to redefine that concept, which has been held to meet the purposes and objectives of the Act.

Aboriginal title is not an interest protected by the Fifth Amendment;[6] petitioner's right to compensation is statutory, deriving from the Indian Claims Commission Act. Most of the litigation arising under that Act has been concluded utilizing the rules applied by the Court of Claims

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[3]Petitioner argues (Pet. No. 75-964, p. 13) that the Commission ignored evidence it submitted in support of its proposed findings of fact concerning its predecessors' use and occupancy of the ceded lands. These proposed findings, however, are addressed solely to *joint* use and occupancy of the land. Petitioner made no claim of exclusive use and occupancy of any portions of Royce Areas 53 and 54.

[4]Under the exclusive possession theory, two or more tribes can nonetheless establish aboriginal title to an area if they shared the land in a close "joint and amicable" relationship. See *Sac and Fox Tribe* v. *United States*, 315 F. 2d 896, 903 n. 11 (Ct. Cl.), certiorari denied, 375 U.S. 921. However, petitioner does not contend that a close and intimate political and social confederacy sufficient to invoke this exception to the general rule existed among the tribes who occupied these lands.

[5]Memorandum for the United States Opposition, No. 75-389, p. 4.

[6]*Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 279.

in this case. Petitioner has advanced no compelling arguments to show why the definition of joint occupancy sufficient to demonstrate aboriginal title should now be substantially broadened.[7]

2. In No. 75-965 petitioner challenges the finding of the Indian Claims Commission that under the Treaty of Greeneville, various tribes held recognized title to Royce Areas 87 and 88, as a result of which it awarded unequal, undivided interests in Royce Area 87 to the Wyandot, Ottawa, Shawnee and Delaware tribes (Pet. No. 75-965 App. B, pp. 36a, 37a-38a).[8] As in No. 75-964, the Commission held that petitioner did not have recognized title to these lands because Reyntueco did not sign the Treaty of Greeneville on behalf of its predecessors in interest and that they therefore acquired no rights under that treaty (Pet. No. 75-965 App. B, pp. 13a-14a). Accordingly, the Commission dismissed petitioner's claim (Pet. No. 75-965 App. B, p. 37a), and denied its petition for rehearing (Pet. No. 75-965 App. C, pp. 42a-54a). On interlocutory appeal, the Court of Claims affirmed, one judge dissenting (Pet. No. 75-965 App. A, pp. 1a-2a).

Petitioner's contention (Pet. No. 75-965, pp. 9-11) that the Indian Claims Commission incorrectly determined that its predecessors in interest were not signatories of, and acquired no rights under, the Treaty of Greeneville is identical to its claim in No. 75-964 (Pet. No. 75-965, p. 12), which we have addressed at pp. 2-3, *supra*.

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[7] This Court has denied review this Term in two other cases that presented identical issues. *James Strong, et al.* v. *United States*, *supra*; *Pottawatomie Tribe of Indians, etc.* v. *United States*, certiorari denied, No. 75-438, December 8, 1975.

[8] The Commission also awarded equal, undivided interests in Royce Area 88 to the Chippewa, Ottawa and Pottawatomie Tribes (Pet. No. 75-965 App. B, p. 38a). The Commission's decision with respect to Royce Area 88 is not challenged, since petitioner asserted no claim to those lands (Pet. No. 75-965, p. 7).

Petitioner also contends (Pet. No. 75-965, pp. 3-4) that the court below erred in failing to award it aboriginal title to portions of Royce Area 87, even though it concedes (Pet. No. 75-965, p. 5) that use and occupancy of that land was not exclusive. But the Commission concluded that none of the various claimants held aboriginal title to any portion of Royce Area 87 because no tribe had proved that it maintained exclusive use and occupancy of a definable portion of that land "for a long time" prior to the 1817 cession (Pet. No. 75-965 App. B, pp. 13a-14a). Petitioner does not challenge the application of this well-settled principle to these lands but here suggests as it did in No. 75-964, that this Court formulate a new rule of aboriginal title. The reasons why the present definition of joint occupancy sufficient to demonstrate aboriginal title should not be substantially broadened are set forth at pp. 3-5, *supra*.

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.